



**Ottawa Canada v Otiato (Civil Appeal E067 of 2024)
[2025] KEHC 14938 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14938 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E067 OF 2024
DK KEMEL, J
OCTOBER 24, 2025**

BETWEEN

OTTAWA CANADA APPELLANT

AND

FRANCIS OTIATO RESPONDENT

*(An appeal from the judgment and decree of Hon. J.P.Nandi (S.P.M)
delivered on 22nd November 2022 in Bondo CMCC No. E014 of 2022)*

JUDGMENT

1. The appeal arises from the judgment of Hon. J.P Nandi at the trial court where the Appellant had sued the Respondent on allegations of breach of contract. The gist of the case was that the Appellant claimed to have been contracted by the Respondent to do some excavation and landscaping work at a fee of Ksh 500,000/= (five hundred thousand). According to the plaint dated 11/2/2022, the Respondent was to pay a deposit of ksh 200,000/= to the Appellant before commencing the work and that the balance of ksh 300,000/= was to be paid at the conclusion of the contract. The Appellant pleaded that he performed his part of the bargain but no payment at all was made to him and thus claimed for the total sum of ksh 500,000/= from the Respondent. After a full trial, the learned trial magistrate dismissed the Appellant’s case.
2. The Appellant was aggrieved by the dismissal and thus filed his Memorandum of Appeal dated 3rd December 2024 wherein he raised the following grounds of appeal:
 - i. That the learned trial magistrate completely misunderstood the evidence before the court, wrongly analysed the evidence and came to a wrong conclusion of fact and law.
 - ii. That the learned trial magistrate erred in law and fact in finding that the Appellant had not given sufficient reasons.



- iii. That the learned trial magistrate erred in law and fact in finding that the Appellant had failed to prove the existence of photographic evidence as proof of landscaping work done on the Respondent's land.
- iv. That the learned trial magistrate erred in law and fact in arriving at a judgment that was against the weight of the evidence on record.
- v. That the learned trial magistrate erred in law and fact by disregarding all the evidence that was adduced by the Appellant as proof that the Appellant did his part of the contract by doing the excavation and landscaping terraces as agreed but that the Respondent failed to honor his part of the bargain by refusing and/or neglecting to pay the Appellant the total sum of KShs 500, 000/=.
- vi. That the learned trial magistrate erred in law and fact in finding that the Appellant failed to prove his case on a balance of probabilities.
- vii. That the learned trial magistrate erred in law and fact in totally ignoring the explanation put forth by the Appellant during the hearing, to be considered, for granting of damages for breach of contract.
- viii. That the learned trial magistrate erred in law and fact by failing to appreciate the significance of the documentary evidence tendered in support of the Appellant's case.
- ix. That the decision demonstrated partiality and bias.

The Appellant therefore prayed that the appeal be allowed and the trial court's judgement dated 22/11/2024 be set aside and the matter be heard afresh before another trial magistrate of competent jurisdiction and that the Appellant be awarded the costs of the appeal.

3. Being a first appeal, I have a duty to evaluate the entire evidence by subjecting it to a fresh exhaustive analysis and arrive at my own independent conclusion. I have to bear in mind that I did not have the opportunity to hear or see the witnesses as they testified and thus I must give due allowance for that. (See *Selle & Another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123; *Peters v. Sunday Post Ltd* (1958) EA 424; *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* Civil Appeal No. 345 of 2000.(Okubasi, Githinji & Waki JJA).
4. The Appellant testified as PW1. He adopted his written statement dated 11/02/2022 as his evidence in chief in which he reiterated the averments contained in the plaint. He produced the documents in his list of documents dated 11/02/2022 as exhibit 1 and 2 respectively.
On cross examination, he stated that he did not have any photographic evidence showing that he did the work. That the Respondent told him to continue with the work as he was going to pick a cheque in Kisumu but that he did not pay him. The Appellant then closed his case.
5. The Respondent did not tender any evidence. He however, filed submissions.
6. The appeal is canvassed by way of written submissions. Both parties duly complied.
7. The Appellant submitted while reiterating his grounds of appeal. He added that the trial magistrate failed to outline the issues for determination as encapsulated under Order 21 rule 4 thus arriving at a wrong decision. He placed reliance on the case of *Al-Malik Brothers Motors Limited vs Jackline Kemunto Ondari & Another Kisii HCCA No. 120 of 2006*.



8. The Appellant submitted further that he proved his case on a balance of probabilities. He relied on the case of *Miller vs Minister of pensions* [1947] 2 ALL ER 372 cited with approval in *D.T. Dobie Company (K) Ltd vs Wanyonyi Wafula Chebukati* [2014] eKLR where the court stated:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say ‘we think its more probable than not’ thus proof on a balance or preponderance of probability means a win however narrow....”
9. It was further submitted by the Appellant that his evidence was uncontroverted as the Respondent did not testify during the trial. The Appellant thus submitted that the appeal should be allowed with costs and the trial court’s judgment vacated.
10. On the other hand, the Respondent submitted that there was no contract either written or oral between the Appellant and Respondent. He submitted that the requirements of a valid contract were not adhered to as provided under section 3 of the *Law of Contract Act*. He placed reliance on the case of *Charles Mwirigi Miriti vs Thananga Tea growers Sacco Limited & Another* (2014) eKLR where the Court of Appeal stated that the three essential elements of a valid contract are an offer, acceptance and consideration.
11. The Respondent therefore submitted that the appeal should be dismissed with costs.
12. I have considered the record of appeal, the rival submissions, statutory provisions and the authorities relied on by the parties. I find the issue for determination is whether there was a valid contract between the Appellant and the Respondent.
13. In the case of *William Muthee Muthami v Bank of Baroda* [2014] eKLR, this court observed:

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”
14. In *Charles Mwirigi Miriti -vs- Thananga Tea Growers Sacco Ltd & Another* [2014] eKLR, this Court observed:

“It is trite that there are three essential elements for a valid contract that is an offer, acceptance and consideration”.
15. Also, the learned authors, Cheshire, Fifoot and Formstons, the *Law of Contract*, (14th Edition) at pages 34 and 35, have stated that:

“The first task of the plaintiff is to prove the presence of a definite offer made...Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeree to accept that offer”.
16. In *Abdulkadir Shariff Abdirahim & Another v Awo Shariff Mohammed T/A A. S. Mohammed Investments* [2014] eKLR, the Court of Appeal stated:

“There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain



specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the *Law of Contract Act* is one such provision”.

17. Lord Clarke put it thus in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] UKSC 14:

“The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement”.

18. In the instant case, it was the Appellant’s position that there was a contract between him and the Respondent and that one of the terms was that the Respondent was to pay a deposit of Ksh 200,000/= and the balance of Ksh 300,000/= upon completion of the work. It was the testimony of the Appellant that the Respondent did not pay the deposit but still the Appellant went on to do the work. Hence, the germane question to ask is why the Appellant carried out the work before a deposit was given as per the alleged agreement? It was incumbent upon the Appellant to at least ensure that the Respondent makes even a small down payment as evidence of the agreement before he could embark on the landscaping works. I have seen the agreement dated 7/8/2020 signed by the Appellant and the Respondent but that the same is not witnessed by a third person so as to comply with the provisions of section 3 of the *Law of Contract Act*. It is instructive that the Appellant claimed that he performed his part of the bargain but failed to present even samples of photographs of the area where the landscaping was carried out or even call any of the workers who participated in the exercise. It is obvious that such works entailed mobilization of work force and equipment/materials on the site. The Appellant did not present evidence to the effect that the site was handed over to him by the Respondent. All in all, the salient elements of a contract as per section 3 of the *Law of Contract Act* namely, offer, acceptance and consideration were not established on a balance of probabilities by the Appellant. I am not persuaded by the Appellant’s assertion that the Respondent did not tender evidence and thus his evidence remained uncontroverted because the burden of proof was upon him to prove on a balance of probabilities. Hence, it matters not that the Respondent did not tender evidence on his part. Further, the Appellant’s claim that the trial court ought to have awarded him damages for breach of contract is not convincing in view of the fact that it is trite law that damages for breach of contract are not awardable unless the parties provide for the same in their agreement/contract. In the present circumstances, there is no evidence that the Appellant performed his part of the bargain as claimed since he did not avail any proof or at all. That being the position, it is my finding that there was no valid contract between the Appellant and the Respondent to bind the Respondent to pay any monies as claimed or even as damages for breach of contract. In any event, the Appellant was expected to mitigate his loss once he notices that the contract had hit headwinds. It beats logic for the Appellant to continue with works yet no payment even on the deposit had been made to him. Hence, the finding by the learned trial magistrate was sound and must be upheld.

19. In view of the foregoing observations, it is my finding that the Appellant’s appeal lacks merit. The same is dismissed with costs to the Respondent.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 24TH DAY OF OCTOBER 2025.



D. KEMEI

JUDGE

In the presence of:

M/s Juma.....for Appellant

N/A Oreda.....for Respondent

Kimaiyo/Maureen.....Court Assistant

